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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 70-502

ESTATE OF HARRY FRIED, Deceased, ETHEL FRIED, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

ESTATE OF HARRY FRIED, Deceased, ETHEL FRIED, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on July 13, 1971.

Opinion Below

The opinion of the Tax Court of the United States is reported at 54 T. C. 805 and is reprinted in the Appendix (App. p. A2). The opinion of the Court of Appeals for the Second Circuit is not yet officially reported and is reprinted in the Appendix (App. p. A46).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit affirming a decision of the Tax Court of the United States denying a marital deduction to the petitioner herein

was made and entered on July 13, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Are the provisions of 26 U. S. C. Section 2056, Internal Revenue Code of 1954, and Section 20.2056 of the Treasury Regulations on Estate Tax unconstitutional, as being in violation of the Fifth Amendment to the United States Constitution requiring equal protection of the laws, because of unjustifiable discrimination as between the citizens of the various states in failing to extend to citizens of Common Law states the same marital deduction advantages for Estate Tax purposes as are accorded to citizens of Community Property states?

2. Are the provisions of said sections of the Internal Revenue Code and the Treasury Regulations on Estate Tax unconstitutional because they are so faultily phrased, indefinite and uncertain, and yet so demanding of exactitude as to compliance, as to preclude equality and uniformity of protection to all citizens with respect to the marital deduction laws?

3. Are there conflicts in decisions of this Court and of other Federal Courts of Appeal and District Courts requiring this Court to settle important questions as to the proper construction, interpretation and application of the above sections of the Internal Revenue Code and Treasury Regulations on Estate Tax relating to the marital deduction rule and the "terminable interest rule"?

4. Did the Court of Appeals here render a decision in conflict with applicable local state law?

5. Did the Court of Appeals here decide important questions of federal law in conflict with applicable decisions of this court?

Statutes, Federal Rules and Regulations Involved

26 U. S. C. Section 2056 Internal Revenue Code of 1954;

Section 20.2056 of the Treasury Regulations on Estate Tax;

28 U. S. C. 1254 (1).

Section 7482 of the Internal Revenue Code of 1954.

Statement

In this case, the decedent, who died on July 21, 1963 a resident of New York State (a common law state), left a Will in which he bequeathed his entire estate to his wife, and in a subsequent paragraph provided that should his wife predecease him or die "in the course of or as a direct result of the same accident, casualty or disaster as I or under such circumstances as make it impossible to determine which of us died first, or in the event that my said beloved wife survives me but dies before the probate of this my Last Will and Testament, then . . . I give . . . the whole of said . . . estate to my daughter. . . ." The Respondent disallowed the marital deduction on the ground that this provision of the Will constituted a "terminable interest" although the widow did survive the decedent and actually took the entire estate.

In addition, the decedent as one of two stockholders in a close corporation (the other stockholder being his brother) entered into a stockholders' agreement with his co-stockholder and the corporation providing, among other things, that in the event of the death of either of them

"death benefits in the total sum of FIVE THOUSAND and 00/100 ($5,000.00) DOLLARS shall be paid by the CORPORATION to the widow of the deceased party (or, in the absence of any widow, to the legal representatives of the deceased party), at the rate of ONE HUNDRED and 00/100 ($100.00) DOLLARS each consecutive week, commencing one (1) week after the date of death." The Respondent held that these payments are to be included in the gross estate and not entitled to the marital deduction although the widow survived the decedent and took these benefits.

Jurisdiction was conferred on the Court of Appeals by Section 7482 of the Internal Revenue Code of 1954.

Reasons for Granting the Writ

1. The due process clause contained in the Fifth Amendment of the United States Constitution provides essentially the same safeguard against invidious and unjustifiable discrimination in federal laws as the equal protection clause of Fourteenth Amendment does in the case of state laws.

Bolling v. *Sharpe,* 1954, 347 U. S. 497, supplemented 349 U. S. 294;
U. S. v. *Thoresen,* C. A. Cal. 1970, 428 F. 2d 654;
Bolton v. *Harris,* 1968, 395 F. 2d 642;
Conner v. *Finch,* D. C. Ill. 1970, 314 F. Supp. 369;
U. S. v. *Fallon,* C. A. Ill. 1969, 407 F. 2d 621, cert. den. 395 U. S. 908.

The provisions of 26 U. S. C. Section 2056, Internal Revenue Code of 1954 and Section 20.2056 of the Treasury Regulations on Estate Tax unduly discriminate against citizens of the Common Law states as against Community Property states and do not afford equal protection to all citizens of all the states as regards marital deduction allowances; and although Congress intended to provide for uniformity, the law, as passed, does not so provide.

This Court in *Pennsylvania National Bank* v. *United States,* 1967, 387 U. S. 213 held at p. 219:

> "The general history of the marital deduction is well known. * * * The deduction was enacted in 1948, and the underlying purpose was to equalize the incidence of the estate tax in community property and common-law jurisdictions. Under a community property system a surviving spouse takes outright ownership of half of the community property, which therefore is not included in the deceased spouse's estate. The marital deduction allows transfer of up to one-half of noncommunity property to the surviving spouse free of the estate tax."

See,

United States v. *Stapf,* 1963 375 U. S. 118.

However, the Code and the Regulations do not stop there. They contain provisions known as the "terminable interest rule" in 26 U. S. C. Section 2056 (b) (1), which, unlike the rule in community property states, superimposes limitations upon the allowance of the marital deduction to citizens in common law states based upon contingencies contained in the instrument involved, such as a Will, whereby the spouse might not have taken, though in fact such contingencies never occurred and the spouse, did, in fact, take half or all of the estate, as here. A "terminable interest" is an "interest which will terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency." Federal Regulations on Estate Tax, Section 20.2056 (b)-1(b).

This Court in *Jackson* v. *United States,* 1964, 376 U. S. 503 stated at p. 510:

> "We are mindful that the general goal of the marital deduction provisions was to achieve uni-

> formity of federal estate tax impact between those States with community property laws and those without them. But the device of the marital deduction which Congress chose to achieve uniformity was knowingly hedged with limitations, including the terminable interest rule. These provisions may be imperfect devices to achieve the desired end, but they are the means which Congress chose."

It is respectfully urged that this imperfect device should be declared unconstitutional precisely because, as this Court so held, Congress "knowingly hedged" on the uniformity and equality it sought to achieve, and thus failed to achieve. Where the federal law as enacted by Congress fails to grant equal protection, the Constitution commands that such law be set aside and equal protection substituted.

In the case at bar, the Respondent has stipulated that the surviving spouse did, indeed, survive and receive the entire estate of the decedent. This would have been enough in a community property state. Here, however, the marital deduction was disallowed because of the provision for a contingency in the Will that did not occur: i.e. "in the event that my said beloved wife survives me but dies before the probate of this, my Last Will and Testament, then * * * I give the whole of said * * * estate to my daughter * * *." The Court of Appeals held that this phrase provided for a "terminable interest" and, therefore, disqualified this estate from the benefits of the marital deduction law.

It is respectfully submitted that the Constitution requires that the federal tax law, including the marital deduction law, be equally interpreted and applied to all citizens of all the states, regardless of whether they are community property or common law states; and that as to

the marital deduction, the sole test should be that the spouse survive the decedent and actually take half or more of the estate. All the contingencies that are provided for in Wills and other documents giving rise to the inheritance by the spouse are no more relevant than the normal contingency that the spouse might have predeceased the decedent involved, but did not; and the only relevant fact is that the spouse did survive and did take half or more of the estate. This is the sole test in community property states, and, therefore, in the interests of equality should be the only test in common law states.

2. Exceptions to the terminable interest rule are contained in 26 U. S. C. 2056 (b) (3) and in the comparable Section 20.2056 (b) (3) of the Treasury Regulations on Estate Tax. The Code provides that an interest passing to a surviving spouse shall not be considered to "terminate or fail on the death of such spouse if—

> "(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and
>
> "(B) such termination or failure does not in fact occur."

This Court itself has in fact taken apparently contradictory positions in respect to the interpretation of the marital deduction.

Thus, this Court in *Jackson* v. *United States, supra,* held at p. 510:

> "To the extent it was thought desirable to modify the rigors of the terminable-interest rule, exceptions to the rule were written into the Code. Courts should hesitate to provide still another exception by straying so far from the statutory language as to allow a marital deduction for the widow's al-allowance provided by the California statute. The achievement of the purposes of the marital deduction is dependent to a great degree upon the careful drafting of wills. * * *"

However, in *Pennsylvania National Bank* v. *United States, supra,* this Court at p. 221 appears to have taken another view:

> "Congress' intent to afford a liberal 'estate-splitting' possibility to married couples, where the deductible half of the decedent's estate would ultimately—if not consumed—be taxable in the estate of the survivor, is unmistakable. * * * Plainly such a provision should not be construed so as to impose unwarranted restrictions upon availability of the deduction. * * * The spouse of a testator whose will provides for a specific monthly stipend is deprived of any benefit from the marital deduction, according to the Government's view. But we can find no warrant for that narrow view, in common sense or in the statute and its history."

Thus, it appears that this Court has taken different approaches in respect to the interpretation and applicability of the marital deduction, and unless such differences are resolved by this Court, confusion will be perpetuated with resultant inequities.

Indeed, such differences have extended to the point of conflicts as between various Courts of Appeal and District Courts, as well the Tax Court on the very issue here

involved: whether an estate is entitled to the marital deduction where the Will provided that the estate be paid over to the wife but paid over elsewhere in the event she died "before probate" or "before distribution" of the estate.

The Court of Appeals here held such a clause to be similar to a clause in a Will in *Hansen* v. *Vinal,* CA 8, 1969, 413 F. 2d 882, and that here as there, the estate would not be allowed a marital deduction.

On the other hand, in *Kellar* v. *Kasper,* CA 9, 1955, 217 F. 2d 744, the Court considered a Will which conditioned a bequest to a widow "if living at the time of distribution of my estate", a period obviously longer than that of probate, and remanded the case for further hearing by the District Court, which in 138 F. Supp. 738, held that the estate was entitled to the marital deduction because it was obviously the intent of the decedent that the bequest to the widow be indefeasibly vested in her upon his death.

Similarly, in other cases where the bequest to a wife was to fail if she failed to survive the "distribution" of the estate, courts have held that the estates were entitled to the marital deduction because the bequests were "indefeasibly vested" in the widows on decedent's death.

Smith v. *U. S.,* D. C. Col. 1957, 158 F. Supp. 344;
Steele v. *U. S.,* D. C. Mont. 1956, 146 F. Supp. 316;
H. Martinson Exrx (Est. of H. J. Martinson) v. *Wright,* D. C. Ida. 1959, 181 F. Supp. 534.

The Court of Appeals here sought to distinguish its holding from a contrary holding in *Bland* v. *United States,* N. D. Ala. 1965, 66-1 U. S. T. C. para. 12,362, wherein it was held that an estate was entitled to the marital deduc-

tion where a similar phrase, to the one in issue here, was employed, stating:

> "The Commissioner underscored this language, 'Or if she dies before this will is probated', took that underscored language out of the context of the entire will and looked at the Alabama statute which provides in effect that a will is not effective unless it is filed for probate within five years after the death of the testator. Thus, the Commissioner said that if she died, Elsa Hartung Bland died, more than six months and within five years, up until five years after the death of Earney Bland, that she did not take fee simple title and it would pass to the brothers and sisters. But that is not the way a will is due to be construed. The Supreme Court of Alabama has said that the intention of the testator is always the pole star in the construction of wills and the cardinal rule is to ascertain the intention of the testator and give it effect if not prohibited by law."

Here, the death benefits provided for in the stockholders' agreement were disallowed as a marital deduction, though it would appear that a contrary result is dictated by the holdings in *Jackson* v. *United States, supra*, and *Pennsylvania Nat. Bank* v. *United States, supra,* as well as the holdings in *Dougherty* v. *U. S.,* C. A. 6, 1961, 292 F. 2d 331; *Hamilton National Bank of Knoxville* v. *U. S.,* D. C. Tenn. 1964, 229 F. Supp. 885; *Reynolds Estate* v. *U. S.,* D. C. Mich. 1960, 189 F. Supp. 548 and *Eggleston* v. *Dudley,* CA 3, 1958, 257 F. 2d 398.

3. One of the exceptions to the terminable interest rule is that if it relates to a common disaster, the marital deduction will be allowed. Section 20.2056 (b)-3 of the Treasury Regulations on Estate Tax provides that local

state law shall determine what constitutes a common disaster provision. Here the Court of Appeals refused to follow the local state law in determining whether or not the provision here was or was not a common disaster provision.

In *In re Bull's Estate*, Surr. Ct. N. Y. 1940, 175 Misc. 197, 23 N. Y. S. 2d 5, there was an almost identical provision in the Will, as follows at page 199:

> "In case my said husband shall not survive me or in case of our deaths simultaneously or if the order of our deaths cannot be determined or if my husband shall die in a common disaster with me or so nearly together with me that there shall not have been a reasonable time and opportunity to probate my said Last Will and Testament * * * then and in either of those events I hereby give, devise and bequeath all of my estate * * * in accordance with my said Last Will and Testament dated February 13, 1929."

The Court there held at page 200:

> "The court holds that the condition stated in the quoted text is a single condition related only to the circumstances that would arise if fatal injuries occurred both to the deceased and her husband in a common disaster.
>
> * * *
>
> The normal course of a probate proceeding in this State permits its completion in much less time than the 105 days which intervened between the respective deaths of deceased and her husband."

This case was followed and applied in *In re Dana's Estate*, Surr. Ct. N. Y., 1946, 186 Misc. 955, 61 N. Y. S. 2d 427, aff'd 271 A. D. 970, 69 N. Y. S. 2d 227, aff'd 296 N. Y. 1053.

In view of the holding in *In re Bull's Estate, supra,* the Court of Appeals should have held that here there was only a common disaster clause coming within the exception to the terminable interest rule, and that this estate was entitled to the marital deduction. Under this common disaster exception the six month rule does not apply, as provided in Section 20.2056 (b)-3 (B), of the Treasury Regulations on Estate Tax which provides in part, as follows:

> "However, if the condition (unless it relates to death as a result of a common disaster) is one which may occur either within the 6 month period or thereafter, the exception provided by Section 2056(b) (3) will not apply."

Here, unlike the case of *Hansen* v. *Vinal, supra,* there is a New York case, *In re Bull's Estate, supra,* holding that the phrase relating to death before probate was part of a common disaster clause. *Hansen* v. *Vinal, supra,* was a Nebraska case, which had no local law of Nebraska to follow and, therefore, that case was decided without such mandatory guidelines. Despite the mandatory requirement that the Court of Appeals in this case follow the local law of New York, as decided in *In re Bull's Estate, supra,* the Court of Appeals, elected to disregard the New York law and followed the decision in the Nebraska case of *Hansen* v. *Vinal, supra,* and its acknowledged "harsh" conclusion, based on the reasoning that the marital deduction law is a "thicket" that at times "ensnares bequests" which were designed to accomplish the proper objective of a marital deduction.

The case at bar points out more clearly than ever before that unless this Court clarifies the law dealing with allowance of a marital deduction uniformly and equally

throughout all the states of the United States, the injustices and inequities present here will continue to occur in direct conflict with the mandate of the Constitution and the intent of the legislative framers of the law itself.

4. The Court of Appeals here in refusing to follow local state law and in refusing to allow the marital deduction, elected to adopt a restrictive interpretation of the marital deduction law in contravention of the holding in *Pennsylvania National Bank* v. *United States, supra,* expressing the intent of Congress that a liberal interpretation be applied in favor of the granting of the marital deduction.

CONCLUSION

The petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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STEVEN L. SISKIND,
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Supplemental Stipulation of Facts

TAX COURT OF THE UNITED STATES

Docket No. 4505-67

Estate of HARRY FRIED, Deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true for the purposes of the instant case:

1. The deductions for income taxes totalling $174.32 claimed on Schedule K of the Estate Tax Return (Exh. A) which were disallowed in full by adjustment (e) of respondent's notice of deficiency are allowable to the extent of $125.44.

s/ SIDNEY S. ALLEN
Counsel for Petitioner

s/ Richard M. Hahn
RICHARD M. HAHN,
Acting Chief Counsel,
Internal Revenue Service.

Findings of Fact and Opinion Filed by Judge Scott

54 T. C. No. 78

UNITED STATES TAX COURT

Estate of HARRY FRIED, Deceased, ETHEL FRIED, Executrix, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4505-67. Filed April 22, 1970.

Held: (1) Decedent's estate is not entitled to the marital deduction for personal property passing under a provision of a will, which is construed under the law of the State of New York, that in the event his wife survives him but dies before the probate of his will, the property is bequeathed to his daughter.

(2) An amount of $5,000 which a corporation formed by decedent and his brother paid to decedent's widow is includable in decedent's estate under Sec. 2037, I. R. C. 1954, since the facts show consideration passing from decedent to the corporation to procure the agreement for the payment and a reversionary interest in the $5,000 in decedent's estate of over 5 percent.

(3) On the facts of record respondent's inclusion of the value of an automobile in decedent's estate is sustained.

(4) United States Government bonds which may be used to pay estate tax are properly includable in decedent's estate at face value.

(5) Upon the facts of record respondent's disallowance of part of deductions claimed by decedent's estate for indebtedness for taxes and rent on an apartment is sustained.

Findings of Fact and Opinion Filed by Judge Scott

Sidney S. Allen, for the petitioner.

Robert M. Pearl, for the respondent.

SCOTT, *Judge*: Respondent determined a deficiency in the estate tax of the Estate of Harry Fried in the amount of $8,185.23. One of the issues raised by the pleadings has been partially disposed of by agreement of counsel, leaving for our decision the following:

(1) Whether in computing the estate tax, the bequest to decedent's surviving spouse qualifies for the marital deduction under section 2056, I. R. C. 1954.

(2) Whether the value of benefits payable to decedent's widow by the corporation of which decedent was a 50 percent owner-officer and a director is includable in the estate under section 2037, I. R. C. 1954.

(3) Whether the value of an automobile which was paid for by decedent, registered in the name of the corporation of which he was part owner and after his death transferred to his widow, is includable in decedent's gross estate.

(4) Whether the portion of the deduction for taxes payable claimed by the estate as a deductible indebtedness of the estate, which respondent has not conceded to be deductible, is properly deductible by the estate.

(5) Whether certain United States Treasury bonds owned by decedent at the time of his death which were of the type acceptable at par value in payment of estate taxes should be included in the gross estate at their par value or at their fair market value on the date of decedent's death, such fair market value being less than the par value.

(6) Whether decedent had an indebtedness at the date of his death for 3 months' rent on his apartment which is properly deductible as an estate indebtedness in computing the taxable estate.

Findings of Fact

Some of the facts have been stipulated and are found accordingly.

Ethel Fried, Executrix of the Estate of Harry Fried, the petitioner in this case, was a legal resident of New York, New York on the date of the filing of the petition herein.

The decedent died testate on July 20, 1963. Decedent's last will and testament, which was executed on February 17, 1957, was admitted to probate and letters testamentary were issued to Ethel Fried on August 7, 1963. An estate tax return was filed by the executrix on October 1, 1964, with the Internal Revenue Service in Brooklyn, New York.

Decedent's will, after directing that all just debts, funeral expenses, and expenses of administration of his estate be paid, provided:

> Second: All the rest, residue and remainder of my property and estate, real, personal and mixed of whatsoever kind and nature the same may be and wheresoever situate of which I shall die seized or possessed or to which I may in any wise be entitled at the time of my decease or which may be subject to my disposal by will, I give, devise and bequeath as follows:

A. The whole thereof unto my beloved wife, Ethel Fried, if she survives me, for her use absolutely and forever.

B. In the event that my said beloved wife Ethel Fried, shall predecease me or shall die in the course of or as a direct result of the same accident, casualty or disaster as I or under such circumstances as make it impossible to determine which of us died first, or in the event that my said beloved wife survives me but dies before the probate of this my Last Will and Testament, then and in either of said events, I give, devise and bequeath the whole of said rest, residue and remainder of my estate to my daughter Elaine Fried Allen, if she survives me, or if she shall have predeceased me, then the whole thereof to her issue per stirpes.

The will then proceeded in paragraph "Third" to provide for the management of property by the executrix or executors if such property should vest in absolute ownership in a minor. Paragraph "Fourth" provided as follows:

> FOURTH: In the event that any beneficiary under this Will and I or any other person on whose death such beneficiary shall become entitled to receive either income or principal under this Will, shall die in a common accident or disaster or under such circumstances that it is difficult or impractical to determine who survived the other, then I direct that, for the purpose of this Will, such beneficiary shall be deemed to have predeceased me or such other person as the case may be.

Paragraph "Fifth" directed the decedent's executors to comply with any stockholder agreements which he might have executed during his lifetime. Paragraph "Sixth" appointed Ethel Fried as sole executrix, and in the event she predeceased the decedent or was unable or unwilling to act, appointed Elaine F. Allen as sole executrix. Paragraph "Seventh" granted broad powers to the executrix or executors in the management and handling of the estate, and paragraph "Eighth" provided as follows:

> EIGHTH: It is my wish that all legacies under this Will shall be satisfied by my Executor as soon as may be practicable after my death, but I direct that no legacy shall bear interest if not paid within the time specified by any law.

The will contained only 8 paragraphs.

Decedent's will was drafted by Sidney S. Allen, the decedent's son-in-law who was admitted to practice law in the State of New York in 1937.

Decedent's widow, Ethel Fried, survived the probate of decedent's will and the entire net estate was distributed to her.

Harry Fried and his brother Elliot Fried, had for some time prior to 1957 operated a partnership. In 1957 they transferred the assets of the partnership to a corporation.

The decedent, his brother Elliot Fried, and Brake Laboratories, Inc., entered into an agreement which recited in part:

> AGREEMENT, made the 9 day of May, 1963, effective as of the first day of October, 1956, by and between Harry Fried * * * hereinafter referred to as

Findings of Fact and Opinion Filed by Judge Scott

"Harry", Elliot Fried, * * * hereinafter referred to as "Elliot", and Brake Laboratories, Inc., a New York Corporation, having its principal place of business at 552-554 West 23rd Street, Borough of Manhattan, City of New York, hereinafter referred to as the "Corporation";

WITNESSETH

WHEREAS, Harry and Elliot, for a number of years prior to the 1st day of April, 1957, had been co-partners doing business under the firm name and style of Scientific Brake Laboratories, engaged in the business of repairing and servicing motor vehicles, specializing in the repair and replacement of brakes, said business then being located at 537 First Avenue, in the Borough of Manhattan, City of New York; and

WHEREAS, Harry and Elliot caused the incorporation of the Corporation on the 12th day of July, 1950, with the intention of transferring the business of said partnership and all of its assets, tangible and intangible, to said Corporation at an appropriate time; and

WHEREAS, due to certain condemnation proceedings effecting the said premises 537 First Avenue, Borough of Manhattan, City of New York, the business of said partnership was directed to be removed from said premises and the parties found another location, whereat said business might be continued, commencing as of the 1st day of April, 1957, namely, at premises located at 552-554 West 23rd Street, Borough of Manhattan, City of New York; and

Findings of Fact and Opinion Filed by Judge Scott

WHEREAS, Harry and Elliot as co-partners doing business as Scientific Brake Laboratories, did transfer all of their said business and assets, tangible and intangible, as aforementioned, to the Corporation as of the 1st day of April, 1957, and the Corporation did enter into a lease, dated the 5th day of October, 1956, for a term of fifteen (15) years for the purpose of conducting the said business of repairing and servicing motor vehicles, specializing in the repair and replacement of brakes, at premises 552-554 West 23rd Street, Borough of Manhattan, City of New York; and

WHEREAS, Harry and Elliot did agree to terminate their said partnership under the firm name and style of Scientific Brake Laboratories as of the 1st day of April, 1957; and

WHEREAS, the Corporation has conducted the said business at the said last mentioned location as of, and since, the 1st day of April, 1957; and

WHEREAS, the parties desire to agree upon all matters respecting their respective interests in the said business and of the assets thereof, tangible and intangible, as well as their respective interests in the Corporation;

NOW, THEREFORE, in consideration of One and 00/100 ($1.00) Dollar, and other good and valuable consideration, receipt and sufficiency whereas is hereby acknowledged, and in consideration of the mutual promises and covenants herein contained, it is mutually agreed as follows:

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1. Harry and Elliot, individually and as co-partners, doing business as Scientific Brake Laboratories, have sold, assigned and transferred, and do hereby, by these presents, sell, assign and transfer, as of the 1st day of April 1957, to the Corporation, and the Corporation does hereby accept, all of their right, title and interest in and to the business and assets, tangible and intangible of the business theretofore conduct by Harry and Elliot, as co-partners, doing business under the firm name and style of Scientific Brake Laboratories, of repairing and servicing of motor vehicles, specializing in the repair and replacement of brakes, upon terms, whereby the Corporation has issued, as of the 1st day of April 1957, to each of Harry and Elliot, ten (10) shares of its capital stock at a price equivalent to their respective interests in said partnership business and assets, tangible and intangible, and whereby, the said stock was duly accepted by Harry and Elliot in full payment and satisfaction of all of their right, title and interest in the said business and assets, tangible and intangible, theretofore conducted, and owned by them, under the firm name and style of Scientific Brake Laboratories. In consideration of the foregoing, Harry and Elliot do hereby agree that the said co-partnership theretofore conducted by them under the firm name and style of Scientific Brake Laboratories, was, and the same hereby is, dissolved as of the 1st day of April 1957, and they mutually release each other of, and from, any and all rights and obligations arising out of their said co-partnership and their said business conducted under the co-partnership name and style of Scientific Brake Laboratories.

2. So long as Harry and Elliot remain stockholders in the Corporation:

a) The officers and directors of the Corporation shall be and remain as follows, and they agree to vote, as stockholders and directors for the election of the following:

OFFICERS

President	Harry Fried
Treasurer	Elliot Fried
Secretary	Harry Fried
Vice President	Elliot Fried

DIRECTORS

Harry Fried
Elliot Fried
Sidney S. Allen

b) In the event of the death or resignation of Sidney S. Allen, as a director in the Corporation, the number of directors upon the Board of Directors, shall be increased to four (4), two (2) of which directors shall be elected in accordance with the designation of Harry and two (2) of which directors shall be elected in accordance with the designation of Elliot. In the event of the death of either Harry or Elliot, the offices formerly held by the deceased party, and his designee, shall be elected in accordance with the designation of the survivor, pending the payment, in full, of the purchase price for the stock owned by the deceased party and payable to the legal representatives of the deceased party, as hereinafter provided; or in

the event of a default in the payment in full, of the purchase price for the stock of the deceased party, as hereinafter provided, then the offices formerly held by the deceased party, and his designee, shall be elected in accordance with designation of the legal representatives of the deceased party.

c) Both Harry and Elliot shall be employed by the Corporation and their salaries shall at all times be equal. In the event of any illness or incapacity of Harry or Elliot, preventing them from partially or fully performing their duties, the full salary of such ill or incapacitated party shall, nevertheless, be paid to such party during the course of his illness or incapacity. In the event of the death of either Harry or Elliot, death benefits in the total sum of Five Thousand and 00/100 ($5,000.00) Dollars shall be paid by the Corporation to the widow of the deceased party, (or, in the absence of any widow, to the legal representatives of the deceased party) at a rate of One Hundred and 00/100 ($100.00) Dollars each consecutive week, commencing one (1) week after the date of death.

d) Without the unanimous consent of all the stockholders of the Corporation, in writing, no further or additional shares of stock of any kind shall be issued by the Corporation.

e) Unanimous consent by all of the stockholders of the Corporation shall be required for the passage of all resolutions by the stockholders; and the consent of at least a majority of the directors of the Corporation shall be required for the passage of all resolutions by the Board of Directors.

3. None of the shares of stock held by Harry or Elliot or their successors, shall be sold, assigned, hypothecated, pledged, encumbered, or otherwise disposed of, unless the owner of such stock shall have first offered, in writing, to sell all of his stock in the Corporation to the other stockholder and to the Corporation, upon a price to be fixed in accordance with the provisions of Paragraph 4 hereof, and unless said offer is not accepted by the other stockholder and/or by the Corporation, within sixty (60) days from the date of their receipt thereof. If said offer is accepted by the other stockholder and/or the Corporation, in writing, within the said thirty (30) days, the price for said stock shall be payable upon terms of payment of said price in thirty-six (36) equal consecutive monthly installments, commencing thirty (3) [*sic*] days from the date of said acceptance. In the event that neither the other stockholder nor the Corporation accept the said offer, in writing, within the said sixty (6) [*sic*] day period, then the offering stockholder may sell, assign or otherwise dispose of his stock in the Corporation to anyone, whomsoever, and upon any price or terms whatsoever.

4. The price of all of the stock owned by each of Harry and Elliot in the Corporation for all purposes set forth in this agreement shall be the sum of Fifteen Thousand and 00/100 ($15,000.00) Dollars, plus an amount equivalent to one-half of all such monies as remain on deposit as security, with Robert L. Graham, Jr. and Ross F. Eadie, as Trustees under the Will of Clement Moore Ogden, Deceased, as landlords of premises 552-554 West

23rd Street, Borough of Manhattan, City of New York, under the terms of the lease dated October 5, 1956 between said landlords and the Corporation. Such price, however, may be changed at any time, and from time to time, by the unanimous personal endorsement upon the original of this agreement by all of Harry and Elliot and the Corporation, of any change in the price for their respective stock. The last such price so endorsed upon this agreement shall be the price payable for the stock of the respective parties pursuant to the terms of this agreement. In the absence of any such endorsement, however, by all of the parties, as to any change in said price, the price, as hereinabove provided, shall be the price payable pursuant to this agreement.

5. In order to take into account, the impact upon the Corporation of the death of either Harry or Elliot, the parties agree as follows:

a) Each of Harry and Elliot have executed an assignment in blank of all of their stock in the Corporation and have deposited the certificates of said stock with Sidney S. Allen, in escrow, to be held subject to the terms of this agreement. • • • Notwithstanding such assignment, deposit and endorsement, each of Harry and Elliot Shall Be entitled to exercise all rights of ownership of his stock, subject to the terms of this agreement.

b) The Corporation has obtained insurance policies on the lives of each of Harry and Elliot, as listed upon Schedule B annexed hereto and made a part hereof, and, to the extent deemed advisable by the Directors of the Corporation, the Corpora-

tion may, from time to time, obtain additional insurance policies upon the lives of said stockholders, and any additional insurance policies, when obtained, shall be set forth upon said Schedule B. The Corporation has paid and shall pay the premiums upon said insurance policies and shall be the owner of said policies. The Corporation is the primary beneficiary of the insurance policies listed upon said Schedule B, hereto annexed, but the primary beneficiary of said policies and any policies hereafter obtained by the Corporation, shall be changed by the Corporation, from time to time, in accordance with the written instructions of the stockholder upon whose life the particular insurance policy is written, and the insurer shall be entitled to accept and rely exclusively upon this designation. Regardless, however, of the particular designation of the beneficiary of the insurance policies listed upon said Schedule B, and as hereafter may be obtained by the Corporation, the proceeds of such policies of insurance, when received by the beneficiary of such insurance policies, shall be received by such beneficiary, in trust, to be applied exclusively and solely toward the purchase from the legal representatives of the deceased stockholder of so much of the stock of the deceased stockholder as can be purchased with such proceeds and the stock so purchased shall be transferred to the Corporation as more particularly hereinafter set forth and the escrow holder of said stock shall, upon payment of the proceeds of said insurance policies to the legal representatives of the deceased stockholder, deliver to the Corporation so much of the stock of the deceased stockholder as is equivalent in value to the proceeds so received.

c) Upon the death of either Harry or Elliot, if the proceeds of the insurance policies on his life, as listed upon Schedule B hereto annexed and as may be hereafter obtained by the Corporation, are not sufficient to purchase all of his stock, or if his life is no longer insured by the Corporation, the Corporation shall, nevertheless, purchase the stock of the deceased stockholder and the legal representatives of the deceased stockholder, shall sell, to the Corporation, all of the deceased stockholder's stock, upon the price to be determined as provided for in paragraph 4 of this agreement. The balance of said purchase price, over and above any and all proceeds received from the said insurance policies, is to be paid in installments, at the rate of One Hundred and 00/100 ($100.00) Dollars, each and every week, commencing one (1) year from the date of death of the deceased stockholder. In the event that the Corporation does not have sufficient surplus within which to pay any or all of the installments due on account of such purchase price for the stock of the deceased stockholder, as hereinabove provided, then in that event, the surviving stockholder shall pay such installments on account of said purchase price for said stock during such period of time when the Corporation is unable, due to lack of surplus, to pay for same.

* * *

Decedent Harry Fried was born on May 25, 1895, and Ethel Fried, his widow, was born on June 29, 1892.

On or about April 24, 1963, decedent purchased a 1963 4-door Chrysler Newport sedan with his own funds. The

automobile was registered in the name of Brake Laboratories, Inc. The corporation considered the money advanced by decedent to purchase the automoble to be a loan by decedent to the corporation. The value of the automobile at the date of decedent's death was $3,049.79. Subsequent to decedent's death, Brake Laboratories, Inc., transferred the automobile to decedent's widow.

On the date of his death decedent owned three 2½ percent United States Treasury bonds of a par value of $1,000, each dated December 1, 1944, which could have been used to pay Federal estate taxes. At the date of decedent's death the fair market value of these United States Treasury bonds was $2,718.75.

Decedent at the time of his death resided in the apartment which he originally leased in 1943 for a term expiring in October. The original term of the lease expired many years prior to decedent's death. No other lease agreement was entered into by decedent even though he continued to reside in the apartment. The apartment in which decedent lived was subject to the Rent Control laws of the city of New York.

On the estate tax return, deductions were claimed on Schedule K for indebtedness to the Internal Revenue Service for additional income tax for 1962 in the amount of $15.32 and balance of 1963 income tax in the amount of $159. On this return an indebtedness for rent for decedent's apartment for the months of August, September, and October 1963 was claimed in the total amount of $237.27.

No real estate was reported on the estate tax return, the major part of the reported estate consisting of bank deposits and stock.

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Neither the value of the automobile purchased with decedent's funds nor an indebtedness from the corporation in the amount of the purchase price was reported as an asset on decedent's estate tax return. On Schedule B, item No. 6, the estate tax return reported, "$3000. par value U. S. Treasury Bonds, 2½ percent dated 12/1/44 due 1966-71 at $906.25," with a value at the date of death of $2,718.75. No amount was included in the gross estate on the estate tax return as the value of the agreement with Brake Laboratories, Inc., to pay to decedent's widow an amount of $5,000 although this payment was reported as an amount not includable in the gross estate. The estate tax return shows as the total gross estate the amount of $126,068.92, deductions in the amount of $7,935.99, and bequests to surviving spouse in the amount of $116,990.93, with a claimed marital deduction for the the bequests to the surviving spouse in the amount of $59,066.47.

Respondent in his notice of deficiency disallowed the claimed marital deduction to the extent of $47,419.14 with the explanation, "the property passing to the surviving spouse represents a non-deductible terminable interest." Respondent increased the estate reported by the amount of $5,000 with the explanation that "death benefit payments totaling $5,000 payable to the decedent's spouse, pursuant to an agreement entered into between the decedent and his employer, are includible in the gross estate." Respondent increased the value of stocks and bonds reported by the amount of $281.25, explaining that Treasury Bonds, 2½ percent dated December 1, 1944 due 1966-71 were includable at par value in the amount of $3,000 in lieu of the value of $2,718.75 reported on the estate tax return. Respondent increased the gross estate by the amount of $3,049.79 with the explanation that it had been determined that an automobile with that fair market value

at the date of decedent's death was includable in the gross estate. Respondent increased the gross estate by the disallowance of claimed debts of decedent in the amount of $411.59 with the explanation that it had not been shown that total taxes in the amount of $174.32 claimed to be deductible were allowable deductions or that claimed rental of $237.27 was an allowable deduction.

Petitioner and respondent entered into a supplemental stipulation of facts to the effect that the deductions for income taxes totaling $174.32 claimed on Schedule K of the estate tax return which were disallowed in respondent's notice of deficiency were allowable to the extent of $125.44.

OPINION

The major issue in this case is whether the estate is entitled to a marital deduction under section 2056, I. R. C. 1954,[1] in excess of the amount allowed by respondent. Both parties recognize that this issue depends in its entirety on whether the bequest by decedent to his wife of his residual estate is a terminable interest within the meaning of section 2056(b).[2] This, in turn, depends upon the construction

[1] All references are to the Internal Revenue Code of 1954 unless otherwise indicated.

[2] SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(b) Limitation in the Case of Life Estate or Other Terminable Interest.—

(1) General rule.—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

* * *

[Footnote continued on page A19]

of the decedent's will, particularly with reference to subparagraph (B) of the second paragraph thereof. The provision contained in this paragraph which is crucial to our decision is:

> In the event that my said beloved wife * * * shall predecease me or shall die in the course of or as a direct result of the same accident, casualty or disaster as I or under such circumstances as make it impossible to determine which of us died first, or in the event that my said beloved wife survives me but dies before the probate of this my Last Will and Testament, then and in either of said events, I give, devise and bequeath the * * * remainder of my estate to my daughter * * *

Both parties recognize that the will is to be interpreted under the law of the State of New York. It is petitioner's contention that the only circumstance under which the residual estate would not go to decedent's spouse is the circumstances that both decedent and his spouse died as a result of the same accident, casualty, or disaster. Petitioner contends that for this reason the only condition

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[Footnote continued from page A18]

(3) Interest of spouse conditional on survival for limited period.—For purposes of this subsection, an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if—

(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(B) such termination or failure does not in fact occur.

that might have caused a termination of the bequest to decedent's spouse was her death as a result of a common disaster with the decedent, and for that reason the bequest is not to be considered an interest which will terminate or fail on the death of the spouse within the provision of section 2056(b)(3)(A). Petitioner relies for this interpretation of the will primarily on the case of *In re Bull's Estate*, 175 Misc. 197, 23 N. Y. Supp. 2d 5 (1940). The clause which was being interpreted in the case of *In re Bull's Estate*, stated:

> In case my said husband shall not survive me or in case of our death simultaneously or if the order of our deaths cannot be determined or if my husband shall die in a common disaster with me or so nearly together with me that there shall not have been a reasonable time and opportunity to probate my said Last Will and Testament and this Codicil thereto and thereby formally to establish rights thereunder, then and in either of those events I hereby give, devise and bequeath all of my estate, * * * in accordance with the provisions of my said Last Will and Testament, dated February 13, 1929.

The facts in *In re Bull's Estate, supra,* were that the decedent died on July 26, 1939, and her husband died on November 8, 1939, both of natural causes. The persons who would have taken under decedent's will of February 13, 1929, contended that because of the death of decedent's husband so close after her death the paragraph which we have quoted operated to deprive him of his deceased wife's estate. The Court, in construing the will, stated:

> The court holds that the question must be determined solely on the text of the codicil and that none

> of the external facts enumerated upon in some of the briefs can be considered in determining issue. The particular text which requires construction is this: "or if my husband shall die in a common disaster with me or so nearly together with me that there shall not have been reasonable time and opportunity to probate my said Last Will and Testament and this Codicil thereto and thereby formally to establish rights thereunder." It is argued that this text defines a single condition which is centered upon the fact of a common disaster and contemplates the immediate death of both in such a disaster or the death of the testatrix therein and the death of the husband soon thereafter. It is argued on the contrary that the text contains two conditions and two central ideas. Concededly one of these is death of both in a common disaster. The other and separate idea is asserted to be the death of the husband so close to that of the testatrix as to leave insufficient time "formally to establish rights" on the part of the husband by the probate of the will and codicil of the testatrix. * * * The court holds that the condition stated in the quoted text is a single condition related only to the circumstances that would arise if fatal injuries occurred both to the deceased and her husband in a common disaster. * * * This conclusion of the court determines the issue and established the right of the husband of deceased to take her estate since he survived her.

Respondent points to the difference in the language of the will involved in *In re Ewell's Estate*, *supra*, and in the instant case. The same distinction which respondent points out has been made by the Surrogate's Court, New York

County, in *In re Johnston's Estate*, 186 Misc. 540, 64 N. Y. Supp. 2d 543 (1945). This case involved a provision in a husband's will which had been executed as a joint, mutual, and reciprocal will with his wife, each of the duplicate originals being signed by the husband and wife and subscribed to by the same subscribing witnesses. The husband died and 2 months after his death his will was delivered by his widow to attorneys for probate. These attorneys were attempting to locate the husband's next of kin until the widow's death less than 3 months after the death of her husband. The particular paragraph of the will under consideration was as follows:

> And we further provide that in the event of both of us, at the occurence [*sic*] of an accident or otherwise, leaving this life at the same time, or the death of one of us and the death of the survivor before the due legal probate of this last will and testament has been accomplished, after all debts and expenses are paid as above contemplated. We give, devise and bequeath all Our property, whatsoever, real, personal and mixed and wheresoever the same may be situate * * * to Our friend, Earle H. Balch * * *

The next of kin of the widow in *In re Johnston's Estate, supra*, contended, relying on certain cases, among them *In re Bull's Estate, supra*, (23 N. Y. Supp. 2d 5), that this will should be construed as investing the widow with the entire estate. They contended that the clause in the will left the entire estate to the widow except for the one event of the husband and wife dying as a result of a common disaster. The court held otherwise stating (64 N. Y. Supp. 2d 546):

> I find no intent in the language of the articles under construction to make the death of the survivor

from a common disaster the exclusive condition for the alternative designation of Mr. Balch as sole legatee and as executor. The contrary intent is clearly evidenced by the opening clause of the two articles: "And we further provide that in the event of both of us at the occurence [*sic*] of an accident *or otherwise,* leaving this life at the same time, or the death of one of us and the death of the survivor before the due legal probate of this last will and testament has been accomplished, * * *." (Italics mine). It should be noted that all of the conditions, including the death of the survivor, are closely located and are contained in a single sentence. The phrase "at the occurence of an accident or otherwise" was intended to apply not only to simultaneous deaths from an accident or catastrophe, but also from natural causes. That same phrase likewise applied to the death of the spouse first dying and the death of the survivor. The use of the disjunctive "or otherwise" clearly speaks of successive deaths from any cause whatsoever—natural as well as accidental. The conditions in the will must be construed as if written as follows: "In the event of the simultaneous deaths of both of us or the death of one of us and the death of the survivor as a result of a common accident or from natural causes before the due probate of this will, we give all our property to Earle H. Balch." The next of kin here would have the Surrogate disregard the words "or otherwise" by striking them from the will. The disjunctive "or" must be given full significance.

The court stated that the case of *Matter of Bull's Estate,* 175 Misc. 197, 23 N. Y. S. 2d 5 was distinguishable. The

language in the will of the decedent in the instant case is quite comparable to the language as paraphrased by the Court in *In re Johnston's Estate, supra.* The will here involved contains the provision that should decedent's wife predecease him or die in the course of or as a direct result of the same accident or under such circumstances as to make it impossible to determine which of them died first, followed by "or in the event that my said beloved wife survives me but dies before the probate of this my Last Will and Testament." The clear intent as expressed by this language is that one circumstance under which the residuary estate will pass to decedent's daughter instead of to his widow is should decedent's wife die in the course of or as the result of a mutual accident or under circumstances as to make it impossible to tell which died first, and another circumstance under which the residual estate would pass to decedent's daughter is should his wife survive him but die before the probate of the will.

The scrivener of the will, decedent's son-in-law, testified at the trial, that when he drafted the will for decedent he told decedent that clause B of the second paragraph was a common disaster clause. He further testified that the decedent read the will before he executed it. There is substantial argument between the parties as to whether the testimony of the scrivener as to a statement to decedent should have been admitted. Whether this testimony was properly admissible, we need not decide since in our view the language of the will is clear that it provided that the residual estate go to decedent's daughter if his wife died before the probate of the will. In our view the will shows an intent on the part of decedent to have the estate go directly to this daughter in the event his wife died before probate of the will, and therefore whether a statement by

the scrivener to decedent would have any bearing on showing intent need not be considered. Where the provisions of a will are clear and unambiguous, external factors are not to be considered in construing that will under New York law. *In re Bull's Estate, supra,* and *In re Johnston's Estate, supra.*

Petitioner further contends that his position that the language here in issue should be interpreted as applying only to death from a mutual disaster is supported by *Bland* v. *United States,* an unreported case (N. D. Ala. 1965, 17 A. F. T. R. 2d 1363, 66-1 U. S. T. C. par. 12362). In that case, District Judge Lynne removed the issue of whether the estate was entitled to the marital deduction from the jury and held that considering the whole will the estate was entitled to the marital deduction. The provisions of the will which were being interpreted included the following:

> It is here expressly made and provided in this will that if my said wife, Elsa Hartung Bland, and I are killed or die at or near the same time or if she dies before this will is probated, or if she dies within thirty days after my death, it is expressly made and provided that all the part willed, devised, and bequeathed to her shall go to ..... (decedent's brothers and sisters)
>
> • • •
>
> Also, I here advise and suggest to my wife, as Executrix, and my nephew, as Executor, to immediately file this will for probation as soon after my death as practicable.

The court in that case held that reading the will as a whole showed an intention that one-half of decedent's es-

tate was to go to his surviving spouse if she did not die within 30 days after his death. In so holding the Court stated:

> The Supreme Court of Alabama has said that the intention of the testator is always the pole star in the construction of wills and the Cardinal rule is to ascertain the intention of the testator and give it effect if not prohibited by law.
>
> In arriving at that intention the Court should consider the instrument as a whole and not merely to take one statement in the will and say that that is the controlling statement. I have read this will in its entirety several times. It is quite clear to me that it was the intention of Earney Bland that one-half of his adjusted gross estate should go to his surviving widow in fee simple if she did not die within thirty days after his death. It is buttressed by the explanatory statement that is contained in paragraph 3 in which he elaborated on his intentions and further confirmed by the direct content in paragraph 13 of his will that, "Also, I here advise and suggest to my wife, as Executrix, and my nephew, as Executor, to immediately file this will for probation as soon after my death as practicable.
>
> It is quite obvious that he expected, intended his will be filed certainly within thirty days after his death.

The Court in *Bland* v. *United States, supra,* did not hold that the provision was for the property not to pass to the wife only in case she and her husband died in a mutual disaster but rather held that properly interpreted

the will provided that the widow not take if she died within 30 days after her husband's death. That the *Bland* case was not intended to allow a marital deduction for amounts left to a widow by a will that clearly provided for the widow not to take in the event she died prior to the probate of the will is shown by the case of *Silvey* v. *United States*, 265 F. Supp. 235 (N. D. Ala., 1966), also decided by Chief Judge Lynne. The provisions of the will under consideration in the *Silvey* case were as follows:

> ITEM THREE: Should she survive me to the date of the probate of this will, I devise and bequeath to my wife, Willie Warren Silvey, all of my property, both real and personal, subject, however, to the direction and charge contained in Item Two.
>
> ITEM FOUR: Should my wife not survive to the date of the probate of this will, I bequeath • • • [the residue of the estate] to my next of kin surviving me at the date of the probate of this will.

The Court held in the *Silvey* case that the estate was not entitled to the marital deduction stating as follows:

> Clearly such interest does not fit into the exception contained in section 2056(b)(3). [footnote omitted] According to the terms of the will, Mrs. Silvey's death prior to the probate of the will would have terminated the interest bequeathed to her. Since the will could have been filed for probate within a period of five years from the date of the testator's death, Code of Ala., tit. 61, section 34 (Recompiled 1958), there existed at the time of his death a possible contingency that Mrs. Silvey might survive the decedent by more than six months

> and die thereafter before the will was probated. This possible contingency defeats the exception. *Frederick* v. *Commissioner,* decided April 20, 1962 (21 T. C. M. 480, 483).

The Memorandum Opinion (*Estate of William David Frederick,* T. C. Memo. 1962-89) referred to in *Silvey* v. *United States, supra,* is relied on by respondent in this case. That Memorandum Opinion involved a provision in a will that if decedent's wife did not survive him or if her death and his should happen in circumstances to make it impossible to determine the survivor, or in the event the wife did survive but died during the period of probation of his will, the property was left to one of the testator's children. It was pointed out that under the Code of Montana, probation of the will could take a period in excess of 6 months.

The case most nearly comparable to the instant case which has come to our attention is *Hansen* v. *Vinal,* 413 F. 2d 882 (C. A. 8, 1969). That case involved a testator among whose assets were included real estate located in Nevada and Colorado. His will provided:

> 2. The first to die does hereby give, devise and bequeath unto the survivor all of his or her property of every kind and nature, both real and personal, to be the absolute property of such survivor for all intents and purposes.
>
> • • •
>
> 4. In the event that we the joint makers of this will should be taken from this life at or about the same time, or in the event the survivor should not live long enough to probate the will of the first to die, then and in that event, we the joint makers

hereof make the following disposition of all our joint and separate property.

The Court upheld the Commissioner's contention that the estate was not entitled to the marital deduction stating (413 F. 2d at 885-886):

> The trial court found that while the event of probate might occur within six months of the decedent's death, it need not necessarily occur within six months, and, therefore, the grant failed to qualify for the marital deduction allowed by Section 2056.
>
> • • •
>
> While the nature of the interest passed is determined by state law, [footnote omitted] and while the applicable state laws favor early and indefeasible vesting of estates, each state recognizes the validity of an estate subject to a condition. [footnote omitted] A condition was imposed here—that the survivor live long enough to probate the will of the first to die. This condition can only be fulfilled by a judicial act—a determination by the proper court that the instrument offered is the validly executed last will and testament of the deceased. [footnote omitted]
>
> • • •
>
> In our view, the trial court correctly concluded that the condition was not violative of state public policy nor the testator's intent.
>
> The statutory law of Nebraska requires that the will of a deceased person be filed, by the custodian or executor of the will within thirty days of the testator's death or within thirty days after a person learns he has been named executor if he

> obtains such knowledge after the testator's death, under pain of criminal liability. Revised Statutes of Nebraska, 1943, Reissue 1964, sections 30-213-216. [footnote omitted] We must presume that these laws will be complied with and that the instrument will be delivered to the court. When this has been done, the court will make a prompt judicial determination as to whether or not the instrument is the last will and testament of the deceased.
>
> The only circumstance which could reasonably be expected to delay or prevent the indefeasible vesting is a contest of the will—an event that can and does occur whether a devise is subject to a condition or not.[2]

The appellant in *Hansen* v. *Vinal, supra,* also contended that the clause in the will should be interpreted to place as the only condition of the property not passing to the wife her death in a mutual disaster with her husband. The Court held that the provision of the will clearly referred to two separate conditions.

Since we view the will in the instant case as providing that the residuary estate passes to the testator's daughter

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[2] We recognize that under the law of New York real estate might be considered to pass immediately to the widow. See *Estate of Horton* v. *Commissioner,* 388 F. 2d 51 (C. A. 2, 1967), reversing 47 T. C. 641, holding that real estate vested in the heir under New York law immediately upon a decedent's death and therefore even though the estate was not entitled to a marital deduction with respect to personal property left under a will providing that should the testator's wife die before the residuary estate "shall have been distributed" to her, it was entitled to such a deduction with respect to the real property. In the instant case no real property was in the estate. Hereafter in this opinion we discuss the New York law as to the time which may elapse before probate of a will.

if his wife dies before probate of the will, the interest left to decedent's wife was a terminable interest if under New York law, as under Alabama, Nevada, Montana, and Colorado law, the probate of a will may take more than 6 months. In the case of *In re Will of Wool,* 57 Misc. 2d 757, 293 N. Y. Supp. 2d 678 (1968), the Surrogate's Court of Nassau County pointed out that whether or not a will would be probated was a determination to be made by the Surrogate. The Surrogate's Court in *In re Johnston's Estate, supra,* in discussing the second contention of one of the parties therein that a delay of 3 months without offering a will for probate should be construed to be more than "due" time, stated (64 N. Y. Supp. 2d at 547):

> There is no fixed statutory period when a will is required to be filed for probate. Nor could there be any such fixed period imposed by judicial rule because what is a due time, necessarily, depends upon the special circumstances of each estate.

As pointed out in *In re Will of Wool, supra,* when an instrument purporting to be a will has been offered for probate, it may be objected to and a hearing be necessary for the Surrogate to determine whether it will be admitted to probate. That a time of over 6 months can pass between the time a will is offered for probate and is admitted to probate is shown by the facts in the *Wool* case where the offer of the will for probate had been made more than 6 months prior to the decision which was there being rendered with respect to whether to probate the will.

Section 213, N. Y. Civ. Practice Law and Rules (McKinney 1963 at p. 242) provides in part as follows:

> The following actions must be commenced within six years:
>
> * * *

> 7. an action to establish a will; where the will has been lost, concealed or destroyed, the time within which the action must be commenced shall be computed from the time when the plaintiff or his predecessor in interest discovered the loss, concealment or destruction, or could with reasonable diligence have discovered it; * * *

It would therefore appear that under New York law a will could be offered for probate more than 6 months after a testator's death, and it is clear that even if offered for probate within 6 months after the testator's death more than 6 months could expire before its admission for probate. We therefore held that the bequest of the residual estate to decedent's wife did not come within the exception provided by section 2056(b)(3), and therefore does not form the basis for a marital deduction.

It is respondent's position that the $5,000 payable to decedent's widow under his contract with Brake Laboratories, Inc., is includable in decedent's estate under section 2037.[3]

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[3] SEC. 2037. TRANSFERS TAKING EFFECT AT DEATH.

(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if—

> (1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and
>
> (2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms on the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

Findings of Fact and Opinion Filed by Judge Scott

Petitioner takes the position that the payment is not includable in decedent's estate since the decedent did not have a transferable property interest and therefore did not make a transfer of any interest in property within the meaning of section 2037.

Respondent cites and relies on *Worthen v. United States*, 192 F. Supp. 727 (D. C. Mass. 1961), which involved an agreement by the corporation by which the decedent in that case was employed to pay to the employee's widow if the employee died while in the employ of, or after having retired from employment by, the company and if he left no widow to his children, or if no children to his brothers and sisters, a specified amount. The Court held that the amount was includable in the decedent's gross estate as a transfer taking effect at death. In that case the Court stated the Government's argument as follows (192 F. Supp. at 733):

> It argues that Stone had a valuable contract right, conceded by plaintiffs to be enforceable against the corporation, to have a year's basic salary paid to his widow, and that this was a right of the same type which was held to constitute property within the meaning of section 811(a) in Estate of Barber v. Commissioner of Internal Revenue, 3 Cir., 271 F. 2d 97; Goodman v. Granger, 3 Cir., 243 F. 2d 264; Beaver Trust Co. v. United States, D. C., 184 F. Supp. 553, and Wolf's Estate v. Commissioner of Internal Revenue, 29 T. C. 441, reversed on other grounds, 3 Cir., 264 F. 2d 82. These cases hold that death benefits are includable in the gross estate when they are derived from funds which represents deferred compensation to the decedent, or granted in-

> der plans which explicitly gave the decedent direct contractual rights in the funds. * * *

The Court then pointed out that even though there was no specific money or funds transferred by the decedent, Stone, to the corporation, and for this reason there was no transfer of an interest in property owned by the decedent at the date of his death as required by section 811(a), I. R. C. 1939, realistically the corporation was motivated in entering into the contract by its desire to secure for itself the continuance of Stone's services so that in reality Stone's future services were the consideration for which the promise of payment was made and therefore the payments transferred were properly includable in his estate under section 811(c)(3), I. R. C. 1939.[4]

A number of other cases have held payments by corporations to a decedent's widow pursuant to an agreement with the decedent to be includable in the decedent's gross estate under section 811(c), I. R. C. 1939, where there was evidence of consideration passing from the decedent to the corporation in return for the agreement. In *Estate of William L. Nevin,* 11 T. C. 59 (1948), we held an agreement between the decedent whose estate was involved in that case and his employer to make certain payments to the decedent for a period of 10 years, or if he died during the 10-year period to continue the payment to his widow, to cause the commuted value of the payments to be made to the widow to be includable in the decedent's gross es-

[4] Sec. 811(c)(3), I. R. C. 1939, as in effect at the date of the death of the decedent in *Worthen* v. *United States,* 192 F. Supp. 727 (D. C. Mass. 1961), did not require the retention by the decedent of a reversionary interest as does sec. 2037, I. R. C. 1954. However, the provisions with respect to transfer were approximately the same.

tate under section 811(c), I. R. C. 1939 as a transfer taking effect at death. In that case the decedent had agreed, in return for the contract entered into, to retire from his position with the company. We held that the decedent's agreement to retire from a position that he could not have been forced to retire from was consideration for the contract to make the payment both to the decedent and to the decedent's widow. We stated (11 T. C. at 65):

> We think that the situation here falls within the rule of *Commissioner* v. *Clise, supra,* [122 F. 2d 998]. There the decedent acquired, for a valuable consideration, the right to receive certain annual payments, to be continued to his wife after his death. His wife's right to receive such payments was contingent upon her surviving the decedent. His death brought her enjoyment of the right into being. As the court said in the *Clise* case, quoting *Helvering* v. *Hallock,* 309 U. S. 106.
>
> "* * * Section 302(c) deals with property not technically passing at death but with interests therefore created. The taxable event is a transfer inter vivos. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment. * * *"

Unquestionably in the instant case there was consideration passing from the decedent to Brake Laboratories, Inc., since the agreement for the payment to decedent's widow was an overall part of the agreement between decedent, the other owner of stock in Brake Laboratories, Inc., and the corporation with respect to their respective interests in the business and the assets thereof. We have quoted in detail from the contract which defined the con-

sideration each partner was to receive in return for the transfer of his partnership assets to the corporation. The corporation was a party to the contract much of which dealt with the payments to the estate of the deceased former partner stockholder. From reading the contract as a whole we conclude that part of the consideration for the formation of the corporation by the transfer to it of the partnership assets was the lifetime employment at equal salaries of each former partner even though such partner was unable to perform his duties because of illness or incapacity and the payment at the death of each former partner to his widow or legal representative of $5,000.[5]

There is nothing in this record to show the value of the partnership assets transferred to the corporation. The contract sets the value of the stock of each partner at $15,000 and provides for the right of the corporation to purchase the stock for that price and for insurance on the life of each stockholder to facilitate the purchase. The contract is somewhat ambiguous as to whether the corporation is required to purchase the stock but is clear that it is required to pay to a deceased stockholder's widow

[5] Since the same paragraph of the agreement that provides for the death payment also provides for the continuation of the salaries to the stockholder-officers of the corporation in the case of illness or incapacity, it would appear that the amount might be includable in decedent's gross estate under section 2039 as that section has been interpreted in a number of cases. See *Estate of Edward H. Wadewitz*, 39 T. C. 925 (1963), affd. 339 F. 2d 980 (C. A. 7, 1964); *All* v. *McCobb*, 321 F. 2d 633 (C. A. 2, 1963); and *Bahen's Estate* v. *United States*, 305 F. 2d 827 (Ct. Cl., 1962); but compare *Kramer* v. *United States*, 406 F. 2d 1363 (Ct. Cl., 1969), where the payment to be made to the employee should he become disabled was for consulting services and *Estate of Firmin D. Fisz*, 46 T. C. 214 (1966).

or legal representative an amount of $5,000. The agreement of the corporation to pay the amount of $5,000 to the widow or legal representative of a deceased stockholder appears to be an enforceable obligation of the corporation. The agreement is part of the consideration of the transfer to the corporation by each of the two former partners of the partnership assets. The facts in this case are comparable to a situation in which an individual would each month pay in to his corporate employer a portion of his salary in return for the corporation agreeing to pay an amount to his widow upon his death.

Rosenberg v. *United States,* 309 F. 2d 724 (C. A. 7, 1962), involved an issue of whether an amount received by a widow under a pension trust plan was a transfer under section 811(a), I. R. C. 1939, of property in which the decedent had an "interest * * * at the time of his death." In the instant case decedent personally as distinguished from his personal representative after his death, had no interest in the $5,000 at the time of his death because the obligation to pay the $5,000 was in return for a transfer of property to the corporation by decedent prior to his death. As we understand section 2037, it is concerned only with interests in property transferred by a decedent prior to his death and would not be the section applicable to property in which a decedent personally still had an interest at the date of his death. Nevertheless, the following statements contained in *Rosenberg* v. *United States, supra,* (at page 727) are equally applicable to what may constitute a "transfer" under section 2037 as under section 811(a), I. R. C. 1939, which is comparable to section 2033, I. R. C. 1954:

> The fact that the trustee is here utilized as an instrument in effecting a transfer is of no import.

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> In Chase National Bank of City of New York v. United States, 278 U. S. 327, 337, 49 S. Ct. 126, 128, 73 L. Ed. 405, it is pointed out:
>
> > "Obviously, the word 'transfer' in the statute, * * * cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must, we think, at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another."
>
> And in Lehman v. Commissioner, 2 Cir., 109 F. 2d 99, 100, it was stated:
>
> > "While section 302(d) [Revenue Act of 1926] speaks of a decedent having made a transfer of property * * *, it clearly covers a case where the decedent by paying a *quid pro quo* has caused another to make a transfer of property * * *." (Emphasis supplied.)
>
> This Court has expressly recognized that a decedent's services may constitute the *quid pro quo* for a transfer to his widow. Simpson v. United States, 7 Cir., 261 F. 2d 497, 501. * * *

In the instant case the "*quid pro quo*" for the corporation transferring $5,000 to decedent's widow or legal representative was decedent's transfer of his partnership assets to the corporation and becoming an officer and director of the corporation.

In *Kramer* v. *United States,* 406 F. 2d 1363 (Ct. Cl., 1969), the Court held that because the decedent had no

right to receive annuity payments during his lifetime, amounts to be paid to his wife after his death were not includable in his gross estate under section 2039, I. R. C. 1954. The Court then discussed the inclusion under other sections but not section 2037 since the Government made no contention in that case that that section applied.[6] In discussing the applicability of certain other sections which also require a transfer the Court stated (406 F. 2d at 1369):

> Both provisions require a transfer by the decedent. In Worthen v. United States, 192 F. Supp. 727 (D. Mass. 1961) a case decided under similar sections of the 1939 Code, the court found that the decedent's promise of future employment provided the consideration for the promise of payment of post-death benefits by the employer and that the arrangement was in substance a transfer to the one who would benefit from the payment. Other cases have found a transfer in a similar manner. Davis v. Commissioner, 27 T. C. 378 (1956); Estate of Higgs v. Commissioner, 12 T. C. 280 (1949), rev'd on other grounds, 184 F. 2d 427 (3rd Cir. 1950). * * *

In *Adeline S. Davis,* 27 T. C. 378 (1956), referred to in the *Kramer* case we held the commuted value of the wife's right to receive a continued annuity after the death of her husband who was the prime beneficiary under an insurance contract procured for him by his employer to be includable in the deceased husband's estate. In our view where, as here, there is consideration furnished by a decedent for the agreement of his employer to pay death benefits to the wife or other beneficiaries, the amount paid to the wife is by transfer from the decedent. This is in accordance with the recognition in a number of cases that

[6] Apparently, no such contention was made because there was not in that case any reversionary interest in the decedent employee under the agreement.

"transfer" within the meaning of section 2037 includes the procurement for valuable consideration by the decedent of the transfer of property to his beneficiary by another. See *Hanner* v. *Glenn*, 111 F. Supp. 52 (W. D. Ky., 1953), and cases there cited, affirmed 212 F. 2d 483 (C. A. 6, 1954).

Since under the provision of the contract if there was no widow, the payments were to be paid to the "legal representative of the deceased," we conclude that there was the possibility that the property might return to the decedent's estate and therefore the reversionary interest provision of section 2037(b) is met. Our findings show that the decedent was 3 years younger than his wife. Under section 20.2037-1 (c)(3), Estate Tax Regs.,[7] the reversionary interest is to be computed immediately before the decedent's death without regard to the fact of the decedent's death. Under this

[7] Estate Tax Regs., sec. 20.2037-1(c)(3)

(3) For purposes of this section, the value of the decedent's reversionary interest is computed as of the moment immediately before his death, without regard to whether or not the executor elects the alternate valuation method under section 2032 and without regard to the fact of the decedent's death. The value is ascertained in accordance with recognized valuation principles for determining the value for estate tax purposes of future or conditional interests in property. (See Sec. 20.2031-1, 20.2031-7, and 20.2031-9.) For example, if the decedent's reversionary interest was subject to an outstanding life estate in his wife, his interest is valued according to the actuarial rules set forth in Sec. 20.2031-7. On the other hand, if the decedent's reversionary interest was contingent on the death of his wife without issue surviving and if it cannot be shown that his wife is incapable of having issue (so that his interest is not subject to valuation according to the actuarial rules in Sec. 20.2031-7), his interest is valued according to the general rules set forth in Sec. 20.2031-1. A possibility that the decedent may be able to dispose of property under certain conditions is considered to have the same value as a right of the decedent to the return of the property under those same conditions.

section and section 20.2031-7(f), Estate Tax Regs., it would appear that decedent's reversionary interest exceeded 5 percent. The burden of proof that there is not a 5 percent reversionary interest is upon petitioner. Petitioner apparently does not contend that there is not a 5 percent reversionary interest, but merely contends that since the payment was voluntary by the corporation there was no interest transferred by decedent. It might here be noted that petitioner has not questioned respondent's valuation of the payment if it is includable in the estate. We therefore, sustain respondent's determination.

The next issue involves the inclusion in decedent's gross estate of the value of an automobile which was paid for with his funds and registered in the name of Brake Laboratories, Inc. Petitioner argues that the automobile was actually the property of the corporation and that the funds which decedent advanced to purchase the automobile were a loan by decedent to the corporation which has never been repaid. Apparently, though it is not unmistakably clear from the record, the automobile was for the decedent's use. The corporation transferred the automobile to decedent's widow after decedent's death. Neither the value of the automobile, nor the value of the corporate indebtedness to decedent, was included in decedent's gross estate. One or the other should have been included. The burden of proof to show error in respondent's determination is on petitioner, and petitioner has failed to sustain that burden with respect to the inclusion in decedent's gross estate of the value of the 1963 Chrysler automobile.

Other than the concession of respondent with respect to the payment of the balance of decedent's 1962 income tax and a part of his 1963 estimated tax, there is no evidence in the record to show to what extent, if any, the $174.32

claimed as an indebtedness for taxes was an indebtedness of the estate. Again, except to the extent that respondent has conceded the deductibility of these taxes, we sustain respondent because of petitioner's failure to show error in his determination. It may be that petitioner intended the stipulation to be also a concession that the balance of these taxes was not deductible. However, there is some argument in petitioner's brief with respect to this claimed deduction, and, therefore, we consider it necessary to decide this issue. We hold that an indebtedness of $125.44 for taxes due is properly deductible by the estate and the balance of such claimed deduction was properly disallowed.

The next issue is whether the United States Treasury bonds of a par value of $3,000 owned by decedent at the date of his death should be included in his gross estate at that value since they could have been used to pay estate taxes or whether they are includable at their fair market value which is approximately $281 less than their par value. Petitioner's only argument with respect to the bonds is that there is no estate tax due and therefore the bonds could not be used to pay estate tax. Under respondent's determination there is estate tax due and it is apparent that under our decision in this case there will be estate tax due in excess of $3,000. We therefore hold that respondent correctly valued the bonds at their par value. *Bankers Trust Company* v. *United States,* 284 F. 2d 537 (C. A. 1960).

The final issue is whether decedent had an indebtedness at the date of his death for 3 months' rent on his apartment, so that the estate is entitled to a deduction for the 3 months' rent in computing the amount of the taxable estate. This issue is purely factual. Decedent did not

have a written lease on the apartment at the date of his death. Petitioner's sole argument with respect to this issue is the following statement contained in its original brief:

> It is axiomatic that where as here, the decedent was obligated by a lease contract to pay rent for the apartment in which he lived, that the rent payable for the balance of his lease is a debt of the estate and properly deductible as such.

The evidence shows that decedent had a lease on his apartment and the term of the lease entered into had expired at the time of his death. The evidence further shows that the apartment was subject to the Rent Control Laws of the city of New York. At the trial petitioner's counsel argued that even though the lease had expired some years before decedent's death, by operation of the Rent Control Law it was renewed from year to year on an annual basis and therefore the decedent was committed for rent for 3 months after the date of his death. Petitioner's counsel stated that although the lease had long since expired, when it was originally entered into in 1943, its terminal date was October and therefore under the Rent Control Law it was renewed each year to October. Petitioner does not cite any section of the Rent Control Law that provides for renewal of a lease on an annual basis nor has our attention otherwise come to any such provision of law. We therefore sustain respondent in his disallowance of the claimed deduction of $237.27.

Reviewed by the Court.

Decision will be entered under Rule 50.

Decision Entered October 30th, 1970
By Judge Scott

UNITED STATES TAX COURT

WASHINGTON

Docket No. 4505-67

ESTATE OF HARRY FRIED, Deceased,

ETHEL FRIED, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court, filed April 22, 1970, respondent filed on October 6, 1970, a computation for entry of decision. After due notice to the parties, respondent's computation was called for hearing at the Motions Session of the Court on October 28, 1970, at which time respondent was represented by counsel, and there was no appearance by or on behalf of petitioner. After due consideration, the facts recited in respondent's computation are incorporated herein as the findings of the Court, and it is

ORDERED AND DECIDED: That there is a deficiency in estate tax due from the petitioner in the amount of $8,154.88.

Entered: Oct 30 1970

(signed) IRENE F. SCOTT
Judge.

Notice of Appeal

UNITED STATES TAX COURT

WASHINGTON, D. C.

Docket No. 4505—67

ESTATE OF HARRY FRIED, Deceased,

ETHEL FRIED, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Notice is hereby given that Ethel Fried, Executrix of the Estate of Harry Fried, deceased, hereby appeals to the United States Court of Appeals for the Second Circuit from the decision of this court entered in the above captioned proceedings on the 30th day of October, 1970.

s/ SIDNEY S. ALLEN
Counsel for Petitioner,
Estate of Harry Fried, Deceased,
Ethel Fried, Executrix
340 East 64th Street
New York, New York 10021

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 837—September Term, 1970.

(Argued June 1, 1971 Decided July 13, 1971.)

Docket No. 71-1015

ESTATE OF HARRY FRIED, Deceased,
ETHEL FRIED, Executrix,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

Before:

CLARK, *Associate Justice,** SMITH, *Circuit Judge,*
and ZAVATT, *District Judge.***

Appeal from decision of the Tax Court of the United States, Irene F. Scott, *Judge*, 54 T.C. 805 (1970), upholding a deficiency assessment of estate taxes of the estate of Harry Fried. Affirmed.

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* Retired Associate Justice of the Supreme Court, sitting by designation.

** Senior District Judge for the Eastern District of New York, sitting by designation.

Opinion of United States Court of Appeals for the Second Circuit

SIDNEY S. ALLEN, New York, N. Y., *for Appellant.*

CARLETON D. POWELL, Attorney, Tax Division (Johnnie M. Walters, Assistant Attorney General, Meyer Rothwacks and Elmer J. Kelsey, Attorneys, Tax Division, Department of Justice, Washington, D. C., of counsel), *for Appellee.*

SMITH, *Circuit Judge*:

This is an appeal from a decision of the Tax Court [1] (Irene F. Scott, *Judge*), upholding the assessment of a deficiency of $8,154.88 in federal estate taxes of the estate of Harry Fried, who died testate on July 20, 1963. We find no error and affirm the judgment.

The first issue raised attacks the disallowance of a claimed marital deduction. Decedent's last will and testament provided that the entire estate, after debts and expenses, was to go to his wife. It further provided, however, that:

> In the event that my said beloved wife . . . shall predecease me or shall die in the course of or as a direct result of the same accident, casualty or disaster as I or under such circumstances as make it impossible to determine which of us died first, or in the event that my said beloved wife survives me but dies before the probate of this my Last Will and Testament, then . . . I give . . . the whole of said rest, residue and remainder of my estate to my daughter . . . if she survives me, or if she shall have predeceased me, then the whole thereof to her issue per stirpes.

[1] 54 T.C. 805 (1970).

Decedent's widow survived both the decedent and the probate of the estate.

On its tax return, filed on October 1, 1964, the estate claimed this bequest as a marital deduction under 26 U.S.C. §2056(a), Internal Revenue Code of 1954.[2] The Commissioner of Internal Revenue disallowed the deduction under the terminable interest rule of 26 U.S.C. §2056(b), which provides that where an interest passing to the spouse will terminate or fail on the occurrence of an event or contingency or on the failure of such a contingency to occur, no deduction shall be allowed.

The appellant also attacks inclusion within the gross estate of $5,000 received by the widow from Brake Laboratories, Inc., a brake repair business owned and operated by decedent and his brother, pursuant to an agreement reached in 1963 but made retroactive to October 1, 1956. This agreement stated that in the event of the death of either the decedent or his brother, the corporation would pay to the widow, if there was one, $5,000 at the rate of $100 per week. If there was no widow or if the widow died before the end of the fifty weeks, the balance would go to decedent's estate. The Commissioner relied upon 26 U.S.C. §2037, Internal Revenue Code of 1954, which provides:

> (a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any

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[2] "(a) Allowance of marital deduction.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate."

interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if—

(1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and

(2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer) and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

Appellant also attacks the inclusion in the gross estate of the value of an automobile purchased by decedent with his own funds registered in the name of Brake Laboratories, Inc. The corporation apparently considered the money to be a loan from the decedent. Subsequent to decedent's death, the automobile was transferred to the widow by the corporation. Neither the value of the automobile nor the value of the debt were included in the estate's original return.

The next issue relates to valuation of United States Treasury bonds. Decedent owned three 2½ percent United States Treasury bonds of a par value of $1,000 at the date of his death. At that time their fair market value was $2,718.75. The Commissioner increased the value of these bonds to their par value, since under his determination, recited above, the estate tax exceeded the par value of the bonds.

Opinion of United States Court of Appeals for the Second Circuit

Finally, the estate had claimed as a deduction rent for decedent's apartment for the three months following his death. Decedent had originally leased the apartment in 1943, and the lease had expired a number of years before decedent's death. No other lease agreement was entered into, although decedent continued to live in the rent-controlled apartment. The Commissioner disallowed the deduction, contending that this rent obligation was not a debt of the decedent. The Tax Court sustained each of these actions by the Commissioner, and in each instance we affirm.

I. Marital Deduction:

Section 2056(b)(3) of the Internal Revenue Code of 1954 provides that the terminable interest rule does not apply to a bequest which will terminate only if the spouse dies within six months after the decedent's death, or only if the decedent and spouse die in a common disaster, as long as such termination does not in fact take place. There can be little question, however, but that the Tax Court was correct in its conclusion that the specific clause of the will in this case does not bring itself within the terms of this exception. The Tax Court correctly noted that in New York, the location of probate, there is no fixed statutory period when a will is required to be filed for probate.[3] Thus at the time of the making of the will it was quite conceivable that probate would take longer than six months from the date of death. Since by the terms of the will the widow was not to take if she died before probate, it was possible that her interest would be terminated later than six months after decedent's death, thus rendering section 2056(a)(3) clearly inapplicable.

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[3] See, e.g., *In re Johnston's Estate*, 186 Misc. 540, 64 N. Y. S. 2d 543, 547 (Surr. Ct. 1945); *In re Will of Wool*, 57 Misc.2d 757, 293 N.Y.S.2d 678 (Surr. Ct. 1968).

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The estate contends that the language of the clause indicates the decedent's intent to have it serve solely as a simultaneous death-common disaster clause. The words of the clause itself, however, indicate that the intent was to create two separate conditions: that the widow not die in a common disaster, *and* that she not die before probate. The estate bases its argument upon a number of cases which have construed what the estate considers almost identical language as constituting nothing more than common disaster clauses. Though there are some similarities of language in these clauses, in each case there exists a significant difference which clearly distinguishes the present situation.

Strongest reliance by the estate is placed upon the decision of the Surrogate Court in *In re Bull's Estate,* 175 Misc. 197, 23 N.Y.S.2d 5 (Surr. Ct. 1940). In that case the relevant clause read as follows:

> In case my said husband shall not survive me or in case of our deaths simultaneously or if the order of our deaths cannot be determined or if my husband shall die in a common disaster with me *or so nearly together with me that there shall not have been a reasonable time and opportunity to probate my said Last Will* . . . I hereby give, devise and bequeath all of my estate . . . in accordance with my said Last Will and Testament dated February 13, 1929. 23 N.Y.S.2d at 7-8 (emphasis added).

The court held that this clause did not contain two conditions, but only one: that the husband survive a common disaster. The language of the clause in *Bull* is distinguishable, since there the wording could reasonably be read to contemplate that the clause apply only to common disasters, either in which both decedent and her husband

died together, or where he survived shortly after her but eventually died as a result of that disaster. In the present case, no such reading is possible. The intent to create two separate conditions is manifest from the language.

The estate also relies upon the decision in *Bland* v. *United States*, 66-1 U.S.T.C. ¶12,362 (N.D. Ala. Sept. 22, 1965), but that decision is likewise easily distinguished. The relevant clause in *Bland* provided:

> It is here expressly made and provided in this will that if my said wife . . . and I are killed or die at or near the same time or if she dies before this will is probated, or if she dies within thirty days after my death, it is expressly made and provided that all the part willed, devised, and bequeathed to her shall go to [my brothers and sisters].

The court, in interpreting the decedent's intent, construed this clause in its charge to the jury to mean simply that if the wife died within thirty days after his death, the bequest would be void. The court concluded that the decedent must have assumed that his will would be probated before thirty days. It is true that such an interpretation renders the probate portion of the clause superfluous, but the court relied on other language in the will advising that the will be probated as soon as practicable.

In reaching its conclusion on this point, the Tax Court relied, quite correctly, on the decision in *Hansen* v. *Vinal*, 413 F.2d 882 (8 Cir. 1969). There the court disallowed a deduction because the will created the condition that the spouse survive past the date of probate, and under the relevant state law probate could well take place after six months. Thus the exception of the terminable interest rule was held to be inapplicable. The estate contends that re-

liance on this decision is improper, since local law is to apply. Though this may be true, New York law, like that of Nebraska relevant in *Hansen*, provides that probate may be completed well past the six month limit of the terminable interest rule exception.[4] For present purposes, then, the differences between New York and Nebraska law are irrelevant and the Eighth Circuit's decision in *Hansen* is directly in point. We agree with its reasoning. The Tax Court's decision to disallow the marital deduction was correct.

II. $5,000 Death Benefit:

The inclusion of the death benefit in the gross estate is required by section 2037 of the Internal Revenue Code of 1954. The requirements for inclusion in the gross estate in this section are a transfer by the decedent, a right to receive the benefit arising only through survival of the decedent, and the existence in the decedent of at least a 5% reversionary interest. Here the wife's right to receive the benefit was conditioned upon the death of the decedent and the decedent possessed a reversionary interest, since by the terms of the agreement if there were no widow the money was to pass to the decedent's estate. The estate does not seem to dispute that the value of the reversionary interest is greater than 5%.

The major claim raised by the estate is that section 2037 is inapplicable, since no "transfer" by the decedent took place. The Tax Court concluded that the transfer of the partnership assets to the corporation by the decedent and his brother constituted consideration for, *inter alia,* the

[4] In this context, it is relevant to note that under section 213, New York CPLR, the applicable statute of limitations for an action to establish a will is six years.

$5,000 death bequest, and hence the necessary transfer was present. For the terms of section 2037 to apply, there need not have been a direct transfer; it is sufficient that the decedent transferred something to a third party in exchange for the death benefit.[5]

The estate argues, however, that the transfer of the partnership assets to the corporation, which took place in 1957, could not possibly have served as consideration for establishment of the death benefit in 1963. The attorney for the estate, the decedent's son-in-law, who also had prepared the stockholders' agreement containing the death benefit provision, testified that the death benefit was in no way connected to the transfer of the assets. The Tax Court as the finder of fact, however, disbelieved this testimony and interpreted the agreement, in its entire context, as implying that the provision of the death benefit was merely the formalization of a previously reached agreement. The Tax Court could reasonably conclude that there was, in fact, such a "transfer" by decedent. Section 2037 is therefore directly applicable, and the inclusion of the $5,000 death benefit in the gross estate must be upheld.[6]

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[5] See *Worthen* v. *United States*, 192 F. Supp. 727 (D. Mass. 1961); *Lehman* v. *Commissioner*, 109 F.2d 99 (2d Cir.), *cert. denied* 310 U.S. 637 (1940).

[6] The estate also contends that the death benefit comes within the marital deduction of section 2056(a). But since, under the terms of the death benefit provisions, the money was to be paid to the widow only if there was one, it is evident that the widow must have survived decedent to take the benefit. This fact clearly brings the death benefit under the terms of the terminable interest rule, discussed *supra*. The exception to the terminable interest rule for requirements that the spouse survive the decedent by six months is inapplicable, since these payments were being made at the rate of $100 per week, and thus to receive the full amount the widow would have to survive a fifty-week period.

Opinion of United States Court of Appeals for the Second Circuit

III. Inclusion of Automobile in Gross Estate:

The Commissioner included the value of the automobile in the gross estate on the basis of section 2033, Internal Revenue Code of 1954, which provides that "[t]he value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death." As the Commissioner contends in this appeal and as the Tax Court concluded below, either the value of the automobile or the value of the claimed indebtedness should have been included in the gross estate. Although the estate's attorney testified that the automobile was in fact the corporation's, it was reasonable for the Tax Court to conclude that this car, purchased by the decedent with his own funds for a corporation of which he was half owner and used primarily by him and given to his widow after his death was, for all intents and purposes, his automobile. Either the automobile was owned by the decedent, or the corporation still owed him the money for its purchase. Apparently no loan payments, or even repayment arrangements, had been made.

IV. Treasury Bonds:

The Tax Court decided that the Treasury bonds listed in the decedent name should be valued at par, rather than at actual market value, for purposes of meeting the estate tax. We agree with this conclusion. See *Bankers Trust Co.* v. *United States,* 284 F.2d 537 (2d Cir. 1960), *cert. denied,* 366 U.S. 903 (1961). There it was held that where Treasury bonds may be used to apply to the estate tax, they may be measured at par if par is higher than the market value on the date of death. The estate attempts to distinguish the case on the grounds that the estate, including the bonds, in the case at bar has long since been

distributed. The court in *Bankers Trust* emphasized, however, that two of the bonds actually were applied at par in partial payment of the estate tax, and the others might have been so applied. 284 F.2d at 538. Thus the fact that the estate has long since been distributed is irrelevant. All that is of significance is that the bonds might have been used to pay the estate taxes.

V. Rent Payment Deduction:

Section 2053(a)(3), Internal Revenue Code of 1954, permits the estate to deduct from the gross estate claims against it. Here, the estate attempted to deduct the three months' rent allegedly owed by the decedent, and paid by the estate after his death. The claims which may be properly deducted must be those that "represent personal obligations of the decedent existing at the time of his death. . . ."[7] The Tax Court viewed this issue as "purely factual." Its conclusion that the estate had failed to present evidence to demonstrate that a lease existed from year to year was a reasonable one. The estate fails to cite us to any provision of the Rent Control Law of New York City which provides for the establishment of a yearly lease after the initial written lease has expired. Since the estate has not met its evidentiary burden of showing that these rent payments derived from an existing debt or obligation of the decedent, section 2053(a)(3) is irrelevant.

The decision of the Tax Court is affirmed in all respects.

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[7] Treasury Regulations on Estate Tax, §20.2053-4 (26 C.F.R. 1971).

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-502

ESTATE OF HARRY FRIED, DECEASED,
ETHEL FRIED, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (Pet. App. A2–A43) is reported at 54 T.C. 805. The opinion of the court of appeals (Pet. App. A46–A56) is reported at 445 F.2d 879.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1971 (Pet. App. A46). The petition for a writ of certiorari was filed on October 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 2056(b) of the Internal Revenue Code of 1954, which disallows the marital deduction for bequests to the surviving spouse which are

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conditioned on the lapse of time or the occurrence of an event, unconstitutionally discriminates against persons in common law states.

2. Whether both courts below correctly applied state law in construing decedent's will to condition the bequest to his widow on her surviving until the will was probated.

STATUTES INVOLVED

The pertinent provisions of Section 2056 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

Decedent's will provided that all of his estate would go to his wife if she survived him. If she did not survive him, or died in a common disaster with him, "or in the event that my * * * beloved wife survives me but dies before the probate of this my Last Will and Testament," the net estate was to go to his daughter. (Pet. App. A5.)

Decedent, a resident of New York, died in July, 1963. His estate claimed the estate tax "marital deduction," allowed by Section 2056 of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 7–8), for the property bequeathed to the widow. This statute allows a deduction, in an amount not to exceed one-half of the adjusted gross estate, for the value of property passing to a surviving spouse. However, so-called "terminable interests" do not qualify for the marital deduction. These are interests which are not certain to vest in the surviving spouse, but will terminate or fail, and pass to another person, by reason of the lapse of

time, or the occurrence or nonoccurrence of an event or contingency. Excepted from the "terminable interest" rule, and therefore deductible, are interests which may terminate or fail (1) on the deaths of the decedent and spouse in a common disaster, or (2) within a period not exceeding six months from the date of the decedent's death (Section 2056(b)(3)).

The Commissioner disallowed the deduction claimed on the ground that the requirement in the will that the widow survive until probate might delay her taking the bequest beyond the six-month period permitted by the statute, since, under New York law, probate of a will may take more than six months. The Tax Court sustained the Commissioner's determination that the widow's interest was terminable. It rejected petitioner's contention that the language of the will be construed to provide that the requirement of survival until probate was applicable only in the event of a common disaster. (Pet. App. A18–A32.) The court of appeals affirmed, agreeing that this requirement was separable from the common disaster clause, and, therefore, that the bequest to the widow did not come within the common disaster exception to the terminable interest rule (Pet. App. A50–A53).

ARGUMENT

The decision below is correct. There is no conflict or other reason for further review.

1. As this Court has explained, the predecessor of Section 2056 of the Code was enacted in 1948 "to equalize the incidence of the estate tax in community property and common-law jurisdictions" by allowing

"transfer of up to one-half of noncommunity property to the surviving spouse free of the estate tax." *Pennsylvania National Bank* v. *United States,* 387 U.S. 213, 219; see also *Jackson* v. *United States,* 376 U.S. 503. In a community property state, one-half of the community property is not included in the decedent's gross estate, since, under state law, the surviving spouse is deemed to own outright one-half of the community.

Petitioner contends for the first time in this Court (Pet. 4–7) that Section 2056 unconstitutionally discriminates against persons in common law jurisdictions (Pet. 4–7). The nub of this contention is that while the deductibility of marital interests in such jurisdictions is subject to the terminable interest rule, no similar rule applies in community property states. There, as petitioner views the matter, it is sufficient if a spouse in fact survives the decedent and takes one-half or more of the estate.

There is no merit to this contention. Any difference in the incidence of estate taxation in community property and common law jurisdictions is attributable now, as it was before 1948, not to the federal tax law, but to the differing laws of these jurisdictions. See *Fernandez* v. *Wiener,* 326 U.S. 340, 358–359. In any event, the one-half interest of the community property state surviving spouse is not a terminable interest, but rather constitutes an outright ownership interest. This Court so held long ago, and reaffirmed this holding only last term. See *Poe* v. *Seaborn,* 282 U.S. 101; *United States* v. *Mitchell,* 403 U.S. 190. Finally,

it should be noted that to the extent that the property of a community property state decedent is separate property, it may qualify for the marital deduction only if the terminable interest rule of Section 2056 is satisfied.

Petitioner also claims that Congress has a constitutional duty to equalize precisely the impact of the estate tax in community property and common law jurisdictions. But this Court has repeatedly held, most recently last year, that "a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts." *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6.

Here, it is clear that Congress had ample reason for providing that terminable interests do not qualify for the marital deduction—to assure that property interests deducted from the deceased spouse's estate would not also escape taxation in the estate of the surviving spouse. The common disaster and six-month exceptions to the terminable interest rule were designed to ameliorate the possible harsh results of that rule. See S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., pp. 7–8. It was plainly within Congress' prerogatives to fashion detailed rules and exceptions in order to achieve general uniformity in estate taxation in community property and common law states, and, at the same time, protect the revenues.

2. Petitioner mistakenly asserts a conflict in approach between this Court's decisions in *Pennsylvania National Bank, supra,* and *Jackson* v. *United States,*

supra (Pet. 7–8). These cases raise issues different from one another and from that raised here. There is likewise no conflict with the courts of appeals' decisions cited by petitioner (Pet. 8–9). Each of them turns on the language of the particular wills involved and the local law, and is fully consistent with the decision below in applying the terminable interest rule.

3. The lower courts correctly applied New York law in construing decedent's will. Their conclusion, that the requirement in the will that the widow survive until probate was separate from the common disaster clause, is the only conclusion compatible with the unequivocal language of the will. The critical testamentary language in *In re Bull's Estate,* 175 Misc. 197, 23 N.Y.S. 2d 5 (Surr. Ct.), upon which petitioner places major reliance (Pet. 11–12), is, on its face, significantly different. See Pet. App. A21–25; A51–A52.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1971.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

* * * * *

(b) *Limitation in the case of life estate or other terminable interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * *

(3) *Interest of spouse conditional on survival for limited period.*—For purposes of this subsection, an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail on the death of such spouse if—

(A) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding 6 months after the decedent's death, or only if it occurs as a result of a common disaster resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such event; and

(B) such termination or failure does not in fact occur.

* * * * *

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